

Murli a/l Naraindas v Sajni Bai a/p Bulchand

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HIGH COURT (PULAU PINANG) — DIVORCE PETITION NO
33-838 OF 2009
YAACOB MD SAM J
10 JANUARY 2012

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Family Law — Children — Custodianship — Dissolution of marriage by mutual consent — Welfare of children paramount consideration — Application by petitioner for joint custody — Whether application should be allowed — Maintenance — Maintenance of wife and children — Petitioner's current financial status — Whether petitioner should bear educational expenses of children after they turn 18 — Matrimonial property — Division of assets — Whether matrimonial home jointly acquired — Whether respondent entitled to amount in petitioner's EPF and in bank safe deposit box

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The petitioner husband and the respondent wife, who were married on 9 June 1993, had been living apart since March 2008. When the petitioner and respondent separated, the children of the marriage (aged 16 and 15 now) stayed with the respondent in a condominium. As both the petitioner and the respondent had agreed that the responsibility for the breakdown of the marriage was to be apportioned on a 50/50 basis, the present proceedings were only concerned with the remaining issues such as the issue of custody of the children, the maintenance of the respondent and the children, and the division of the matrimonial home and other assets of the petitioner and respondent. The petitioner prayed for joint custody of the children and to liberal visitation rights with overnight stay without the presence of the respondent. The respondent, on the other hand, claimed that she should be granted sole custody of both children on the grounds that only she gave them physical support and love and that the petitioner failed to show any love or concern for either of the two children. In relation to maintenance, the petitioner, a consultant general and vascular surgeon, agreed to pay the respondent RM3,000 a month until she remarried and the children RM4,000 until they attained the age of 18. The petitioner claimed that his monthly income was in the range of RM17,350, whereas his current expenditure including the maintenance he paid to the respondent and the children was in the region of RM20,000 thereby causing him to take advances to cover his monthly expenses. The couple's matrimonial assets consisted of their matrimonial home currently valued at about RM2m, the respondent's 30% shareholding in BN Lakhwani Sdn Bhd, the petitioner's EPF and the contents in the safe deposit box.

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Held:

- (1) The court had to give paramount consideration to the welfare of the

- A children in matters concerning the granting of custody of the children. After having considered all the circumstances of this case and the wishes of the children, this court was of the view that it would be in the best interest of the children if sole guardianship and custody was granted to the respondent. The petitioner was granted liberal visitation rights to the children during weekends and school holidays (see paras 7 & 14).
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- C (2) The assessment of maintenance to be paid to the respondent and the children was based primarily on the means and needs of the parties and the standard of living of the parties prior to the breakdown of the marriage. Although the respondent was unable to produce documentary evidence for her monthly expense, based on the petitioner's testimony as to his income and monthly expenses, this court was of the view that a monthly maintenance of RM7,000 would be reasonable. The petitioner was therefore ordered to pay the respondent a monthly maintenance of RM7,000 from the date when the order of decree nisi was made absolute (see paras 17, 20, 29 & 34).
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- E (3) As for the maintenance of the children, this court was of the view that a monthly maintenance of RM2,500 for each child of the marriage was reasonable. The court also found that it was fair for the petitioner to be ordered to bear the educational expenses of the children until they completed their tertiary education notwithstanding the fact that they could have attained the age of 18 (see paras 35–36).
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- G (4) Although the petitioner argued that the respondent was not entitled to an equal share of the matrimonial home, because she never contributed directly towards the purchase renovation and installments of the home, this court was of the view that she should not be denied her half share in the matrimonial property, which was in their joint names. This court found that since the respondent had contributed to the running of the home and the caring of the two children she was entitled to her half share of the matrimonial home (see paras 37–38 & 41–42).
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- I (5) Having considered the evidence the court found that the respondent was entitled to 1/4 of the amount in the petitioner's EPF as at the date of this order (see para 45).
- (6) The court made no order on the issue involving the respondent's shareholding or other rights and entitlement in BN Lakhwani Sdn Bhd because these were matters under the purview of companies law and enforceable by way of civil remedy (see para 46).
- (7) The items of monetary value in the safe deposit were ordered to be divided equally between the petitioner and the respondent (see para 48).

[Bahasa Malaysia summary]

Pempetisyen suami dan responden isteri, yang telah berkahwin pada 9 Jun 1993, telah tinggal berasingan semenjak Mac 2008. Apabila pempetisyen dan responden berpisah, anak-anak hasil daripada perkahwinan tersebut (kini berumur 16 dan 15 tahun) tinggal dengan responden di sebuah kondominium. Oleh sebab kedua-dua pempetisyen dan responden bersetuju bahawa tanggungjawab bagi perpecahan rumahtangga mereka dibahagikan atas dasar 50/50, prosiding ini hanya berkaitan dengan isu yang masih tinggal seperti isu penjagaan anak-anak, nafkah responden dan anak-anak dan pembahagian rumah perkahwinan dan aset-aset lain kepunyaan pempetisyen dan responden. Pempetisyen memohon untuk penjagaan bersama anak-anak dan hak lawatan liberal dengan penginapan semalaman tanpa kehadiran responden. Responden, sebaliknya, menuntut bahawa dia sepatutnya diberikan penjagaan mutlak kedua-dua anak atas alasan bahawa dia yang memberikan mereka sokongan fizikal dan kasih sayang dan pempetisyen telah gagal menunjukkan apa-apa kasih sayang atau perhatian kepada mana-mana anak. Berkaitan dengan nafkah, pempetisyen, seorang ketua perunding and pakar bedah vaskular, bersetuju membayar kepada responden sejumlah RM3,000 sebulan sehingga dia berkahwin semula dan anak-anak, RM4,000 sehingga mereka mencapai umur 18 tahun. Pempetisyen mendakwa bahawa pendapatan bulanannya adalah dalam lingkungan RM17,350, manakala perbelanjaan semasanya termasuk nafkah yang dibayarnya kepada responden dan anak-anak adalah dalam lingkungan RM20,000 dengan itu menyebabkannya membuat pinjaman bagi menampung perbelanjaan bulanannya. Aset perkahwinan pasangan tersebut termasuk rumah perkahwinan yang nilai semasanya adalah lebih kurang RM2 juta, pegangan 30% saham responden dalam BN Lakhwani Sdn Bhd, KWSP pempetisyen dan kandungan peti simpanan deposit.

Diputuskan:

- (1) Mahkamah perlu memberikan pertimbangan utama kepada kebajikan anak-anak dalam perkara-perkara berkaitan pemberian jagaan anak-anak. Selepas mempertimbangkan kesemua keadaan kes ini dan kemahuan anak-anak, mahkamah berpendapat bahawa adalah dalam kepentingan terbaik anak-anak tersebut jika hak penjagaan mutlak diberikan kepada responden. Pempetisyen diberikan hak melawat anak-anak tersebut secara liberal pada hujung minggu dan cuti sekolah (lihat perenggan 7 & 14).
- (2) Penilaian nafkah yang perlu dibayar kepada responden dan anak-anak adalah berdasarkan secara asasnya kepada pendapatan dan keperluan pihak-pihak dan taraf hidup pihak-pihak sebelum keretakan rumahtangga mereka. Walaupun responden tidak boleh mengemukakan apa-apa keterangan dokumentar bagi perbelanjaan bulanannya, berdasarkan kepada keterangan pempetisyen mengenai pendapatannya

- A dan perbelanjaan bulannya, mahkamah ini berpendapat bahawa nafkah bulanan sebanyak RM7,000 adalah munasabah. Pempetisyen oleh itu diperintahkan membayar kepada responden nafkah bulanan sebanyak RM7,000 daripada tarikh perintah dekri nisi dijadikan mutlak (lihat perenggan 17, 20, 29 & 34).
- B (3) Bagi nafkah anak-anak, mahkamah ini berpendapat bahawa nafkah bulanan sebanyak RM2,500 bagi setiap anak hasil perkahwinan tersebut adalah munasabah. Mahkamah juga mendapati bahawa adalah adil bagi pempetisyen diperintahkan menanggung perbelanjaan pendidikan
- C anak-anak sehingga mereka selesai pendidikan tinggi walaupun mereka telah mencapai umur 18 tahun (lihat perenggan 35–36).
- D (4) Walaupun pempetisyen menghujahkan bahawa responden tidak berhak kepada bahagian sama rata rumah perkahwinan, kerana dia tidak pernah menyumbang secara langsung untuk pembelian, pengubahsuaian dan ansuran rumah tersebut, mahkamah berpendapat bahawa dia tidak wajar dinafikan hak sama ratanya di dalam hartanah perkahwinan, atas nama bersama mereka. Mahkamah ini mendapati bahawa oleh sebab responden menyumbang dalam pengurusan rumah dan penjagaan dua
- E orang anak, dia berhak kepada separuh bahagian rumah perkahwinan tersebut (lihat perenggan 37–38 & 41–42).
- F (5) Setelah mempertimbangkan keterangan mahkamah mendapati bahawa responden berhak kepada 1/4 bahagian di dalam KWSP pempetisyen setakat tarikh perintah ini (lihat perenggan 45).
- G (6) Mahkamah tidak membuat apa-apa perintah bagi isu berkaitan dengan pemegangan saham responden atau hak-hak lain dan hak di dalam BN Lakhwani Sdn Bhd kerana ini adalah perkara-perkara di bawah rangkuman undang-undang syarikat dan boleh dilaksanakan secara remedi sivil (lihat perenggan 46).
- (7) Item berbentuk kewangan di dalam peti simpanan deposit adalah diperintahkan dibahagikan sama rata di antara pempetisyen dan responden (lihat perenggan 48).]

H Notes

For cases on custodianship, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3318–3411.

I Cases referred to

Ananda Dharmalingam v Chantella Honeybee Sargon [2006] 6 MLJ 179, HC (refd)
Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109, CA (refd)
Koay Cheng Eng v Linda Herawathi Santoso [2004] 6 MLJ 395, HCC (refd)

- Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240; [2004] 7 CLJ 175, HC (refd) **A**
- Borthwick (deceased) Borthwick & Anor, Re v Beauvais & Ors* [1949] 1 All ER 472 (refd)
- Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82; [2005] 2 CLJ 371, HC (refd) **B**
- Shyam Ishta Puthucheariy v Rajveer Singh Dhaliwal* [2011] MLJU 390; [2011] 5 CLJ 310, HC (refd)

Legislation referred to

- Companies Act 1965 **C**
- Law Reform (Marriage and Divorce) Act 1976 ss 76(3), (4), 77, 77(1), 78, 88, 89, 92, 93, 95
- MS Rajendran (Rajen & Lim) for the petitioner.*
- T Tharuma (T Tharuma & Assoc) for the respondent.* **D**

Yaacob Md Sam J:

[1] The petitioner husband and the respondent wife were married on 9 June 1993. The petitioner was 53 years old and the respondent 49 years old. The petitioner is a consultant general and vascular surgeon. The respondent is presently giving English tuition on a part-time basis. The petitioner and the respondent since marriage have stayed together for almost 15 years at premise No 7 Western Garden, 10450 Penang ('the matrimonial home'), the last cohabited address before the petitioner left the matrimonial home some time in March 2008 and lives in a rented apartment. The parties have been living apart since then. The petitioner and the respondent have a son and a daughter who were born of the marriage. The first child and only son, Bhavesh M Lakswani was born on 11 July 1995, now 16 years old. And the youngest child Nanda M Lakhwani was born on 3 August 1996, now 15 years old. The children are now staying with the respondent at No 76-6-3A, Marina Bay Condominium, Jalan Tanjong Tokong 10470 Penang. The matrimonial home is registered jointly under the petitioner's and the respondent's name. **E**

THE TRIAL **F**

[2] At the commencement of the hearing, the petitioner and the respondent have agreed that the proof of the breakdown of the marriage be dispensed with and the degree of responsibilities of each party for the breakdown of the marriage to be apportioned on 50/50 basis. The parties have also agreed that the issue of custody of the children is to be determined after interviewing the children by this court. The petitioner husband called two witnesses namely the petitioner himself ('SP1') and Balakumar a/l Jayaraman, the company secretary of BN Lakhwani Sdn Bhd. The respondent called one witness name, herself. **G**

- A [3] The petitioner has in his divorce petition in *lampiran* 1 made, inter alia, the following allegations:
- B (i) during the marriage, the respondent frequently displayed aggressive, hostile and violent behavior in her treatment of the petitioner, and example of which was an attack with a pointed forked clothes retriever in or about 2004;
- C (ii) during a marriage, the respondent showed a lack of care and consideration for the petitioner and his career as a general and vascular surgeon notwithstanding the fact that the petitioner was the sole breadwinner in the family;
- D (iii) during the marriage, the respondent manifestly an intense dislike of the petitioner's parents and his siblings in total disregard of the petitioner feeling;
- E (iv) on December 2007, the respondent assaulted the petitioner at the matrimonial home by splashing hot tea on his face and then threw a bunch of keys at his face. As a result of the assault, the petitioner had to spend the night at alternative accommodation;
- F (v) in February 2008, the respondent spat on the petitioner and on his food as he was eating;
- (vi) in March 2008, the petitioner was compelled to leave the matrimonial home and live in a rented apartment on account of the intolerable behavior of the respondent;
- (vii) since separation, the respondent has perpetrated harassment in various ways against the petitioner on multiple occasions.
- G [4] The respondent had in her answer and cross petition (*lampiran* 13) denied those allegations and has averred that the marriage has been irretrievably broken down as a result of the petitioner's own behavior, inter alia, the following allegations:
- H (i) it was the petitioner who frequently was aggressive towards the respondent and in fact beat up the respondent in their home and in the presence of their two children;
- I (ii) it was the petitioner who constantly beat the respondent. The petitioner had threatened the respondent and bullied her and constantly accused her of many untrue things;
- (iii) in February 2008 the respondent told the petitioner she had enough of his cruelties against her. The petitioner left the matrimonial home in March 2008 because of the respondent told the petitioner that their marriage was over;

- (iv) through out of the marriage the petitioner had physically, emotionally and mentally abused the respondent, even in the presence of their children, his late father and their Indonesian maid. A

DISSOLUTION OF THE MARRIAGE B

[5] By consent, on 7 March 2011 the court had ordered that the said marriage to be resolved and the decree nisi be made absolute in three months. The remaining issues to be determined by this court are as follows: C

- (a) issue of custody of the children;
- (b) issues of maintenance of the respondent;
- (c) issue of maintenance of the children; and
- (d) division on matrimonial home and properties/assets D

ISSUE OF CUSTODY

[6] I will first deal with the issue of custody of the children. The parties had on the out set of the trial agreed that the issue of custody is to be decided by way of interview of the children by the court. Accordingly, this court on the 21 November 2011 had interviewed the two children, namely Bhavesh M Lakhwani and Nanda M Lakhwani. E F

[7] The power of the court to grant custody of minor children of the marriage is governed by s 88 of the Law Reform (Marriage and Divorce) Act 1976 (referred to as 'Act 164' herein). Under s 89 of the Act, the court in granting an order for custody may impose conditions as the court may think fit to impose. In arriving at a decision the court must give paramount consideration to the welfare of the children taking into account the wishes of the parents and the children. G

[8] It was submitted for the petitioner that there is no evidence whatsoever given in the trial of the matter that the petitioner had failed as a father to the children. In the last three years after the separation the respondent has been deprived of access to the two children. It was said that the petitioner had made many attempts to contact the children only to be retorted with barrage of phone calls by the respondent. Counsel further submitted that the respondent had even answered in cross examination that the children do not need the love of the father. The petitioner prays for joint custody of the children and also liberal visitation rights to the children with overnight stay without the presence of the petitioner. H I

- A [9] Learned counsel for the respondent on the other hand submitted that the petitioner himself had never made any attempt to see the children during the physical separation from the respondent mother. Counsel further contended that the petitioner failed to show any love or concern for the both children. It was also submitted that both children were with the respondent who even at the point of the family living together, ferried the children to school, tuition, to hospital and gave all the physical support and love. Counsel argued there would be serious disruptions if the petitioner's consent is required for the every life of the children.
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- C [10] It was observed in most cases where the father is the sole income earner and the mother is a homemaker, the mother usually enjoys a closer relationship with her children when compared to the father. This is normal as the father usually spends more time with his work or business whereas the mother shows love, affection and care for the children. This observation is also inferred by this court from the interview of the two children. However, if the situation is not addressed during the child tenders years then it would certainly be difficult to achieve it when the children gets older.
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- E [11] In *Leong Wai Kum, Elements of Family Law in Singapore*, at p337 states as follows:
- The foremost way of using the law of guardianship and custody so that it supports rather than undermines parental responsibility is to desist from choosing between the parents as guardian of their child unless this is absolutely essential.
- F ... The court should remain mindful of the principle that minimal intervention into the relationship between the parents and their child means that an order should not be made unless it brings positive benefit to the child. Where there is no positive benefit to the child, no order should be made.
- G [12] Again, in *Leong Wai Kum, Elements of Family Law in Singapore*, at pp 334–335 it is said as follows:
- The Court of Appeal has affirmed that even after one parent is formally appointed the guardian of the child, including at the conclusion of a custody dispute with the other parent during which the parent appointed guardian was picked by the court over the other, the parent appointed guardian will still be expected to co-operate with the other in making major decisions relating to the child ... The significance of these decisions is that in both instances, the court regarded the parent who was appointed the sole guardian of their child still to be required by law to co-operate with the parent who was denied custody in making the major decisions that affect the child.
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[13] In *Shyam Ishta Puthucheary v Rajveer Singh Dhaliwal* [2011] MLJU 390; [2011] 5 CLJ 310 Yeoh Wee Siam JC (as she then was) held as follows:

Their affidavits show the acrimony between the parties such that their relationship has deteriorated to the extent that they would not be able to make joint decisions with regard to the children. It is therefore not in the welfare and interest of these three children for joint guardianship and custody to be awarded to the parties.

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[14] Having considered all the circumstances, and also taking into consideration of the children wishes, this court is of the view that the best interest of the children will be served if sole guardian and custody is granted to the respondent. I therefore allow guardianship and custody of the two children to the respondent. The petitioner is granted liberal visitation rights to the children during weekend on Sunday and school holidays.

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ISSUE ON MAINTENANCE FOR THE RESPONDENT AND THE CHILDREN

[15] The petitioner in his amended divorce petition ('encl 29') prays for the followings:

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Prayer 17(8): petitioner shall pay the respondent a sum of RM3000.00 a month as maintenance for the respondent from the date of the decree absolute until the respondent remarries.

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Prayer 17(9): petitioner shall pay a sum of RM4000.00 a month as maintenance for the two (2) children of the marriage from the date of the decree absolute until the children attained the age of 18.

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[16] Whereas, the respondent in her amended answer and cross petition dated 18 January 2011 ('encl 30') prays for the following:

Prayer (ii): that the petitioner pays a monthly maintenance of RM50,000.00 per month for the two (2) children and the respondent.

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Prayer (iii): that the petitioner maintains the children including financial support of the children until completion of their tertiary education and gainful employment of the children after their tertiary education.

Prayer (iv): that the petitioner provides the entire medical needs of the respondent during her lifetime and of the children until they are gainfully employed.

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Prayer (v): the petitioner shall pay a sum of RM20,000.00 per year as holiday expenses for the respondent and in the case of the children until gainful employment of the children.

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Prayer (vi): alternatively the petitioner pays the respondent the sum of RM10,000,000.00 in lieu of prayer (ii) and (v).

[17] Section 77(1) of the Act 164 provides that the court has the jurisdiction

A to order maintenance to a former wife. Section 78 provides for matters that to be considered in assessment of maintenance to be paid. The court shall base its assessment primarily on the means and needs of the parties.

B [18] It was held in the case of *Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240; [2004] 7 CLJ 175, as follows:

C (1) The assessment of maintenance is based primarily on the means and the needs of the parties. The need of the party seeking maintenance is the crucial factor for providing the maintenance. In deciding the quantum of maintenance, the capacity of the husband, his ability to pay and the realities of the husband or parties' financial position should be taken into account. The potential earning of the applicant for maintenance should also be considered. The power to award maintenance to the wife is clearly provided by s 77 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') whereas s 78 of the LRA provides how the amount of maintenance to be paid by a man to his wife or former wife is assessed (at p 178 d–e).

D (2) The assessment of the maintenance payable in respect to the children is provided for by s 92 of the LRA. Section 93 of the LRA also makes clear that the husband has the primary obligation to maintain the children. The mother only has a secondary obligation where the court is satisfied that having regard to her means it is reasonable to do so (at pp 178f–g and 179b).

F [19] Faiza Thamby Chik J in that case had construed the term of maintenance used in s 77 and s 92 of the Act as follows:

G The term 'maintenance' used in ss 77 and 92 of the LRA aforesaid, should be construed widely as it signifies any form of material provision that will enable the wife and children to be placed in a position to enjoy the same standard of living as they did during the existence of the marriage. In the case of *Re Borthwick (Deceased), Borthwick v Beauvais* [1949] Ch 395 at p 401:

H ... I am of the opinion that in considering what amount of maintenance the petitioner husband should pay to the respondent wife as maintenance for herself and the children, we must consider the means and needs of the parties, taking into account the standard of living of the parties.

I [20] It is clear that the paramount consideration in arriving at the sum of maintenance is the means and needs of the parties and the standard of living of the parties prior to the breakdown of the marriage.

[21] The petitioner had testified among other things that he is a Consultant General and Vascular Surgeon, Department of Surgery at Penang Adventist,

Penang. Penang Adventist Hospital is operated and managed by a company known as Adventist Hospital & Clinic Services (M) Sdn Bhd ('Adventist Hospital').

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[22] The petitioner had also testified that he is currently 53 years old and might not be able to stand and work for long hours in the operation room. Initially, the Adventist Hospital engaged BN Lakhwani Sdn Bhd ('BN Lakhwani') to provide surgical services including management of patients which basically need surgical, vascular and palliative care. Thereafter, the petitioner formed a new company known as BB Jee Sdn Bhd. The petitioner is not employed by the Adventist Hospital, instead the Adventist Hospital engaged the service of a consultancy company, namely, BB Jee Sdn Bhd and the consultancy company appointed the petitioner as a resident consultant to provide services to the Adventist Hospital. All payments for services rendered by the petitioner to the Adventist Hospital will be made to the consultancy company. The petitioner received his monthly salary from the consultancy company.

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[23] The petitioner had testified that his income before tax for year 2010 was RM208,200 and his monthly income was in the range of RM17,350.

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[24] The petitioner had also given a breakdown of his monthly expenses, as follows:

- (a) maintenance (alimony) payments to the respondent and the children is RM7,000;
- (b) loan repayment for house No 7, Western Garden, 10450 Penang is RM4,786;
- (c) financial assistance for maintenance and medication for mother (Madam Kishini Bai) aged 78 years old and my sister, Chandra Devi aged 45 years old (a widow) who is taking care of my mother is RM3,000;
- (d) rental of Pen Villa Apartment including electricity, water RM2,500; and
- (e) personal expenses including food, laundry, petrol, club subscription about RM3,000.

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[25] In short the petitioner's current expenditure per month including the maintenance paid to the respondent and the children is in the region of RM20,000 per month.

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[26] The petitioner also testified that he had been taking advances from BN Lakhwani Sdn Bhd to cover his monthly expenses including paying for the installments of the matrimonial home and paying insurances for the whole

- A family. The petitioner had accumulated a total advances of RM6,599,116.05 as recorded in the Director's Ledger Account from 1 March 2010 to 28 February 2011 ('exh P109').
- B [27] On the other hand, the respondent, who is presently 49 years old, is a graduate with a Bachelor of Arts Degree in Business Administration ('exh D77') and has a Diploma in TESOL ('exh D80'). The respondent had previously in her own affidavit affirmed on 13 November 2009 deposed that she is earning in the range of RM2,000–RM3,000 per month as a teacher. The respondent had also testified that she is a part-time teacher giving English
- C tuition.
- D [28] Learned counsel for the petitioner contended that, the respondent had by her own admission in her witness statement and in the cross examination admitted that she received a sum of RM1,000–RM5,000 monthly as household expenses prior to the breakdown of the marriage. It was submitted that the petitioner has been providing maintenance for the respondent and the children in the sum of RM7,000 per month after the respondent moved out from the matrimonial home in September 2008.
- E [29] The respondent had itemised her monthly expenses incurred in pp 1–4 of bundle 'H' (D83). However the supporting documents produced in pp 5–75 of bundle H were mostly of year 2009–2010. Only two receipts for year 2011 were produced which is on p 44 of bundle H. During the cross
- F examination, the respondent admitted that she was unable to produce the latest receipts or supporting documents for her monthly expenses. It was submitted that the respondent also failed to provide documentary proof on items such as 'music books, string, art supplies' and 'school needs' which totaled up to RM700 per month. Learned counsel for the petitioner submitted that
- G RM3,000 per month as maintenance for the respondent and RM4,000 per month for two children of the marriage is a fair sum taking into account the means and needs of the parties and the standard of living enjoyed by the parties before the breakdown of the marriage.
- H [30] Counsel further added that in addition to the monthly maintenance provided to the children, the petitioner had purchased two insurance policies for each of the child, the AIA endowment (smart scholar) with sum assured of RM35,000 each (exh P20 and P22) and Great Eastern Life Insurance Policy with the sum assured of RM25,00 each (exh P21 and P23).
- I [31] Learned counsel for the respondent on the other hand submitted that maintenance is not restricted to giving a dependant just enough to put a little jam on their bread and butter (see *Re Borthwick (deceased) Borthwick & Anor v Beauvais & Ors* [1949] 1 All ER 472). Maintenance means not only food, but

extends to clothes, the house she lives in (now a rented apartment) pocket money all of which may vary according to the means of the petitioner. The definition of maintenance in *Borthwick* was accepted in *Koay Cheng Eng v Linda Herawathi Santoso* [2004] 6 MLJ 395. In *Borhwick* the court held that the amount of maintenance a husband ought to pay a wife depends on the means and needs of the parties, taking into account the standard of living of the parties which was enjoyed by them during the marriage. It is submitted that the fact that the petitioner supports the family is not something that should diminish or reduce the petitioner's financial responsibility towards the respondent. In *Ananda Dharmalingam v Chantella Honeybee Sargoon* [2006] 6 MLJ 179 the court held that the only test that the court needs to adopt in deciding if any maintenance should be awarded to the children is he means and station in life of the husband.

[32] Learned counsel further submitted that the petitioner's attempt to add his contribution to his late father or family now, ought to be disregarded. The respondent is given RM7,000 per month for both the children and herself. The respondent is seeking maintenance as per her prayers in the witness statement 'DW1U', to cover the children's and respondent's needs until they reach 18 years of age and tertiary education.

[33] In *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 the Court of Appeal had to determine whether maintenance ordered for children ought to cease at attaining 18 years of age. The Court of Appeal dismissed the appeal saying in appropriate cases involuntary financial dependence constitutes a 'physical disability' under s 95 of the LRA 1976. It was submitted that the children would be physically disabled to achieve their goals in life here seek tertiary education should the petitioner fails to assist them. Though the respondent was challenged having not produced current receipts, except for D73 and D73 (1-3), the respondent confirmed the sums were the same and she had the current ones with her although not produce. In the alternative the respondent is seeking a lump sum for all her claims of RM10m.

[34] Section 78 of the LRA (Act 164) requires this court to assess the means and needs of both the respondent and the petitioner and also their respective conducts which contributed to the irretrievable breakdown of the marriage in coming to a decision whether the respondent is entitled to any maintenance and if so, the amount to be awarded. Having considered the evidence and the submission, this court is of the view that a monthly maintenance of RM7,000 would be reasonable to be ordered upon the petitioner. The petitioner is hereby ordered to pay RM7,000 monthly as maintenance for the respondent. The payment will take effect from the date of the order of decree nisi made absolute and thereafter before the seventh of each months.

- A [35] As to the maintenance of the two children, having considered the evidence, this court of the view that a monthly maintenance of RM2,500 for each child of the marriage is reasonable and be ordered upon the petitioner. The total sum would be RM5,000 to be paid with effect from the date of the order of decree nisi made absolute and thereafter before seventh of each
- B months.

- C [36] This court is of the view that it is only fair for the petitioner to be ordered to bear the educational expenses of the children until they complete their tertiary education notwithstanding they may have attained the age of eighteen.

MATRIMONIAL ASSETS

- D [37] The matrimonial home known as 7, Western Gardens, 10450 Penang is where the respondent and petitioner lived prior to their separation. The current value of this matrimonial property is about RM2m. This property was purchased in year 2004. The purchase price of the matrimonial home was RM800,000 as shown in the sale and purchase agreement dated 18 October 2004 ('exh P24') and the petitioner had paid a total deposit of RM80,000. The
- E petitioner testified that he had also spent a further sum of RM400,000 to renovate the matrimonial home ('exh P65').

- F [38] The matrimonial home is under the joint names of the petitioner and the respondent. The petitioner had funded the balance purchase price of RM720,000 via housing loan from OCBC Bank Bhd under the petitioner's name. The petitioner had as at 1 June 2011 settled a sum of RM1,267,182 and the balance payable as at 1 June 2011 is RM83,990.26. Currently, the
- G petitioner is servicing the monthly repayment of the housing loan which is RM4,786.

- H [39] Counsel for the respondent submitted that the respondent's contribution is clear in the evidence. The respondent was acknowledged in a research paper and the petitioner thanked the respondent (see exh 'D3'). She was a housewife and took care of the children. The respondent contributed to the running of the home. The La Vilas Condominium which was known as the Gombak property was under their joint names and when the property was sold for RM150,000 the petitioner agreed he did not give any share of the proceeds of the sale to the respondent although he agreed they pooled their resources when they were renting the same. The petitioner after selling the Gombak property, purchased another which is called Tamarind which he called the family property. This purchase was done with part of the proceeds from the earlier sale of the Gombak property.
- I

[40] It was submitted that respondent is entitled to a share of the matrimonial property, that is half of the value of the said property. This is important because the children's future has to be protected. The respondent as the mother has no property or a source of income comparable to the petitioner.

A

[41] Learned counsel for petitioner on the other hand submitted that the respondent had admitted that she never contributed directly towards the purchase, renovation and installments of the matrimonial home. Thus, she is not entitled for equal share of the value of the matrimonial home. Counsel also submitted that in considering the proportion of the matrimonial home to be awarded to the parties, this court should also take into consideration that the petitioner had solely paid a sum of RM1,667,182 towards the purchase and renovations. The petitioner still owes this sum (RM1,667,182) to BN Lakhwani Sdn Bhd. The respondent holds 30% of the shares in BN Lakhwani Sdn Bhd. The respondent has all the avenues under the Companies Act 1965 to compel the respondent to settle the advances or borrowings to BN Lakwhani Sdn Bhd. Counsel further submit that this court should also take into consideration that the respondent will be enriched twice if the respondent is awarded a share in the matrimonial home and subsequently she files an action against the petitioner under Companies Act 1965 to compel the petitioner to settle his advances to BN Lakhwani Sdn Bhd. Learned counsel submitted that the respondent only be entitled 1/4 of the value of the matrimonial after deducting the cost of the renovation which tantamount to RM400,000 as fair and reasonable sum.

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[42] Having considered the evidence and the submission, this court is of the view that the respondent should not be denied of her share in the matrimonial property. This property is in a joint name. The respondent has contributed to the running of the home and caring of the two children. I hold that the respondent is entitled to half share on the matrimonial home.

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EMPLOYER'S PROVIDENT FUND

[43] Counsel submitted that the respondent is also entitled to part of the EPF contribution as this is part of matrimonial assets. The respondent is claiming 1/3 of the total sums. The balance in the EPF account of the petitioner as at 5 July 2011 is RM621,196.23 ('exh P34') and the balance in the EPF account of the respondent as at 21 July 2011 is RM172,427.30.

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[44] In the case of *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82; [2005] 2 CLJ 371, it was decided that EPF formed part of the matrimonial assets of the parties and therefore will also attract the operation of s 76(3) and s 76(4) of the Act and the party who acquired the assets should receive a major share.

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A [45] Having considered the evidence and submission by parties, this court is of the view that the respondent is entitled to half of the amount in the petitioner's EPF (KWSP) as at the date of this order.

B SHAREHOLDING OF THE RESPONDENT IN BN LAKHWANI AND THE 'LOAN' OR 'ADVANCES' TAKEN BY THE PETITIONER FROM BN LAKHWANI WHICH AMOUNTED TO ABOUT 6.6M

C [46] This court is of the view that the issue involving shareholding of the respondent in BN Lakhwani and the 'loan' or 'advances' and respondent's rights and entitlement as a shareholder and director in the said company are matters under the purview of companies law and enforceable by way of civil remedy. Hence, no order is made under this prayers.

D CONTENTS IN THE SAFE DEPOSIT BOX

E [47] Both the petitioner and the respondent had testified that the contents in the deposit box were gold bullions, jewellery and watches given to them as wedding gifts and/or dowry during marriage. There are also Gold Kijang Coin worth about RM5,000 at the time of the purchase.

F [48] Having considered the evidence and submission, this court is of the view that all items of monetary value in the safe deposit box to be divided equally between the petitioner and the respondent.

[49] In conclusion, it is hereby ordered that:

- G (a) guardianship and custody of the two children be given to the respondent. The petitioner is granted liberal visitation rights to the children during weekend on Sunday and school holidays;
- H (b) the petitioner to pay RM7,000 monthly as maintenance for the respondent. The payment will take effect from the date of the order of decree nisi made absolute and thereafter before the seventh of each months;
- I (c) the petitioner to pay RM2,500 as maintenance for each child with effect from the date of the order of decree nisi made absolute and thereafter before seventh of each months;
- (d) the petitioner to bear the educational expenses of the children until they complete their tertiary education notwithstanding they may have attained the age of eighteen;
- (e) the respondent is entitled to half share on the matrimonial home address at No 7, Western Garden, Georgetown, Pulau Pinang;

- (f) the respondent is entitled to 1/4 of the amount in the petitioner's EPF as at the date of this order; **A**
- (g) no order is made under the prayers involving shareholding, loan or advances or other rights and entitlement of the respondent in BN Lakhwani Sdn Bhd; **B**
- (h) item of monetary value in the safe deposit box to be divided equally between the petitioner and the respondent;
- (i) the respondent's claim in respect of the petitioner's investments (local) and foreign investments is dismissed; and **C**
- (j) prayer for a sum of RM20,000 per year as holiday expenses for the respondent and the children is dismissed.

[50] Lastly it is ordered that each party bears its own costs.

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Order accordingly.

Reported by Kohila Nesan

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